

Norfolk Carolina Telephone Company and Communications Workers of America, AFL-CIO, Petitioner. Case 11-RC-4285

March 7, 1978

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

Pursuant to a Decision and Direction of Election issued on January 21, 1977, an election by secret ballot was conducted in the above-entitled proceeding on February 17, 1977, under the supervision of the Regional Director for Region 11 of the National Labor Relations Board, among the employees in the unit found appropriate. At the conclusion of the election the parties were furnished with a tally of ballots which showed that, of approximately 224 eligible voters, 104 cast ballots for, and 115 cast ballots against, Petitioner. There was one void ballot and no challenged ballots. Thereafter, Petitioner filed timely objections to conduct affecting the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the objections was conducted and, on May 3, 1977, the Acting Regional Director for Region 11 issued and served on the parties his Supplemental Decision and Certification of Results of Election. Thereafter, Petitioner filed a request for review of the Acting Regional Director's Supplemental Decision in which it contended that he departed from officially reported precedent in overruling Objections 1 and 2. Subsequently, the Employer filed a brief in opposition thereto.

On July 20, 1977, the Board issued a telegraphic order granting Petitioner's request for review solely with respect to Objection 1, remanding the case to the Regional Director for the purpose of conducting a hearing on Objection 1, and staying the Certification of Results of Election pending further action. The Board's order provided that, upon conclusion of the hearing, the designated Hearing Officer issue a report, returnable to the Board, containing findings of fact, resolutions of the credibility of witnesses, and recommendations to the Board. Pursuant to the Board's order, a hearing was held before Hearing Officer Paul K. Tamaroff on August 24, 1977, in Elizabeth City, North Carolina.

On October 5, 1977, the Hearing Officer issued and duly served on the parties his Report and Recommendation on Objection 1, in which he recommend-

ed that the Petitioner's objection be sustained and that the election be set aside and a new election be directed. Thereafter, the Employer filed timely exceptions to the Hearing Officer's report and a brief in support thereof, and Petitioner filed a brief in reply to the Employer's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees in the North Carolina Division, including traffic, installation and repair, construction and engineering, assistant engineers, accounting, marketing, general administration, and commercial departments; excluding confidential employees, seasonal employees, part-time janitresses, guards, and supervisors as defined in the Act.

5. The Board has reviewed the rulings made by the Hearing Officer at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Hearing Officer's report, the exceptions and briefs, and the entire record in this case and makes the following findings:

In recommending that Objection 1 be sustained, the Hearing Officer found that the Employer's announcement and granting of a retroactive wage increase and reimbursement for wages lost through the Employer's implementation, in early 1975, of a reduced workweek to its North Carolina Division employees during Petitioner's organizational campaign were calculated to influence the employees' choice of bargaining representative. The Employer has excepted to the Hearing Officer's conclusions, contending, *inter alia*, that the payments were made in accordance with established policy and practice. We find merit in these exceptions.¹

¹ Inasmuch as the Employer's decision to grant and its announcement of the retroactive wage increase occurred prior to the filing of the petition

herein, they were not within the critical period and the issue of whether they might have interfered with the conduct of the election was not before the

Petitioner represents employees of the Employer's Virginia Division. Since 1969, Petitioner and the Employer have had successive collective-bargaining agreements covering the Virginia Division employees. As indicated above, the election herein was held in a unit of employees in the Employer's North Carolina Division.

In February 1975, the Employer reduced the workweek of both the Virginia Division employees and the North Carolina Division employees from 40 to 35 hours. Grievances were filed on behalf of the Virginia Division employees under the collective-bargaining agreement applicable to the Virginia Division. Thereafter, the parties submitted the issue to an arbitrator. In June 1976,² the arbitrator issued an award, finding that the Employer had violated the collective-bargaining agreement by reducing the workweek of the Virginia Division employees. The arbitrator, however, did not specify a procedure to be followed for remedying the Virginia Division employees' loss of wages.

On July 31, the collective-bargaining agreement covering the Virginia Division employees expired. In August and September, the parties conducted negotiations for a new contract. During negotiations, the parties discussed proposed procedures for making reimbursements to the Virginia Division employees under the arbitration award. Also during negotiations, Petitioner's representative informed the Employer's representative that Petitioner intended to conduct an organizing campaign among the North Carolina Division employees. Negotiations concluded September 19 with an agreement which included new wage scales and progression tables, effective retroactively to August 1, for the Virginia Division employees. In August or September, the Employer posted a notice at the North Carolina Division announcing that new wage scales and progression tables would be applicable to the employees of that division and would be effective as of August 22. In this notice, the Employer informed the North Carolina Division employees that these new rates would not be reflected in their paychecks until October 14, but that they would receive retroactive pay from August 22 at the new rates in a separate check to be issued by December 1.

On or about October 12, after the completion of the Virginia contract negotiations and the announcement concerning new wage rates for the North Carolina Division employees, Petitioner and the Employer reached an agreement as to the formula to

be followed in reimbursing the Virginia Division employees for wages lost during the reduced workweek in 1975. The checks to the Virginia Division employees were distributed on October 21. Also on that date, the Employer posted a notice at the North Carolina Division informing the employees there that they also would receive compensation for wages lost as a result of the reduced workweek. In this notice, the Employer stated that "despite the absence of legal compulsion, it would be only fair to apply the same formula [as that applied to the Virginia Division] to the North Carolina Division, since the same 35-hour week program was in effect [at both divisions]." The Employer distributed checks to the North Carolina Division employees on or about November 19.

Although Petitioner indicated during the Virginia Division bargaining sessions that it intended to conduct an organizing campaign among the North Carolina Division employees, it did not actually begin solicitation of authorization cards at that location until October 14. Thereafter, on November 18, it filed its petition with the Board seeking to represent the North Carolina Division employees.

It is well established that the Board will regard the granting of employee wages and/or benefits during the period immediately preceding an election as having been calculated to interfere with the employees' choice of bargaining representative, in the absence of a showing by the Employer that the timing of the grant was governed by factors other than the organizational activity.³ In the instant case, the record clearly shows that it has been the Employer's established policy to grant substantially the same wages and benefits to its unrepresented North Carolina Division employees as it grants to its represented Virginia Division employees. Furthermore, it is uncontroverted that in the past the effective dates of the North Carolina Division employees' wage and benefit increases have been approximately 1 month after the Virginia Division employees received their increases and benefits. Here, as indicated above, the new wage rates were retroactive to August 1 for the Virginia Division employees and to August 22 for the North Carolina Division employees, and the checks representing compensation for the reduced workweek were distributed to the Virginia Division employees on October 21 and to the North Carolina Division employees on or about November 19. Thus, with respect to the timing of both of these payments, it is

Hearing Officer. These matters are, however, relevant to the question remanded; i.e., whether the payment made on November 19, 1976, during the critical period, tended to interfere with employee free choice. Accordingly, we do not adopt the Hearing Officer's findings concerning the Employer's motivation for its prepetition actions. We do adopt the Hearing

Officer's findings that the events set forth in fact occurred and we rely on them only to the extent they shed light on the November 19 payment.

² Unless otherwise specifically stated, all dates herein refer to 1976.

³ See, e.g., *Essex International, Inc.*, 216 NLRB 575 (1975).

clear that the Employer's actions were consistent with its established policy and past practice.⁴

In view of the foregoing, we find, contrary to the Hearing Officer, that the Employer's making the payments herein were not calculated to interfere with the free choice of the employees in selecting a bargaining representative. Accordingly, we hereby overrule Petitioner's Objection 1, and we shall certify the results of the election.

⁴ The Hearing Officer relied, *inter alia*, on the retroactive nature of the wage increase in finding that the Employer's announcement and granting of the increase were objectionable. Although there is testimony in the record that this was the first time in at least 4-1/2 years that the North Carolina Division employees' increase was retroactive, the effective date of the Virginia Division employees' increase was dictated by the effective date of the newly negotiated collective-bargaining agreement, and the Employer did not significantly depart from its past practice of granting new wages to the North Carolina Division employees approximately 1 month after the effective date of new wages granted to the Virginia Division employees.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Communications Workers of America, AFL-CIO, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

With respect to his finding that the announcement and granting of compensation for the reduced workweek constituted objectionable conduct, the Hearing Officer relied, *inter alia*, on the fact that the Employer was not under a legal obligation to apply the arbitration award to the North Carolina Division employees. Although technically the Employer was not under a legal obligation to reimburse the North Carolina Division employees, it is clear that the employees at both divisions were affected in the same manner by the Employer's implementation of the reduced workweek.